



# Orego

Theodore R. Kulongoski, Governor

## Public Utility Commission

550 Capitol St NE, Suite 215

**Mailing Address:** PO Box

2148 Salem, OR 97308-2148

**Consumer Services**

1-800-522-2404

Local: (503) 378-6600

March 4, 2008

Secretary  
Federal Communication Commission  
445 12th Street, S.W.  
Washington D.C. 20554

RE: WC Docket No. 07-245

The Public Utility Commission of Oregon (OPUC or Oregon Commission) appreciates the opportunity to comment on the Federal Communication Commission's (FCC) Notice of Proposed Rulemaking on the Amendment of the Commission's Rules and Policies Governing Pole Attachments (Docket No. FCC 07-187).

The Oregon Commission is certified by the FCC to regulate pole attachments in Oregon. The Oregon Commission recently undertook a comprehensive review of its pole attachment rules and revised them significantly in Order No. 07-137. We offer comments on selected FCC inquiries based on our revised rules.

**13a. We [FCC] inquire about the difference in pole attachment prices paid by cable systems, incumbent LECs, and competing telecommunications carriers that provide the same or similar services.**

Oregon licensees and attachers, and governmental entities<sup>1</sup> pay under the same pole attachment rate formula – a modified version of the federal cable rate formula. Utility-specific information is plugged in to the formula to calculate a rate.

Attachers also pay separate charges for such attachment costs as preconstruction activity, post-construction inspection, make ready costs, and related administrative charges. OAR 860-028-0110<sup>2</sup>

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sets forth the details of Oregon's rental rate formula, carrying charge components, and separate charges. A copy of Oregon's pole attachment rules is enclosed with these comments.

Parties are allowed to agree on terms that differ from those in our rules. If they cannot so agree, our rules contain default rate formulas that can be contested at an administrative hearing before the OPUC.

In the event of a dispute, a party can challenge the formula and cost components set forth in our rules but the burden of proof is on them to show an alternative rate is just, fair, and reasonable.

**13b. We [FCC] seek comment on how the states that regulate pole attachments handle issues that arise concerning rates and access.**

Oregon uses a dispute resolution process. A utility or pole attacher may petition the Oregon Commission to resolve disputes related to a new or existing contract. Commission proceedings on the dispute may involve conduct of discovery by the parties, resolution of legal issues, and an evidentiary hearing as needed. The Oregon Commission issues a decision order, which may be appealed to the Oregon appellate courts.

**15. We also seek data that may shed light on how many poles incumbent LECs own or control compared with the number of poles owned or controlled by electric utilities.**

About 75 percent of the utility poles in Oregon that support both high voltage electric and communication networks are owned by electric utilities. ILECs own the rest. Oregon's electric utilities' share of these joint use poles has increased over time.

In Oregon's rural areas, electric utilities own all the joint-use poles. In Oregon's largest cities (i.e., Portland, Salem and Eugene), the split is approximately 65% (electric) to 35% (telephone).

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<sup>1</sup> In Oregon, governmental entities are not licensees and not subject to pole attachment agreements. However, governmental entities are subject to the same permitting and rental rates as any licensee in the State.

<sup>2</sup> Definitions for the rules are found in OAR 860-028-0020

**26. We [FCC] tentatively conclude that all attachers should pay the same pole attachment rate for all attachments used to provide broadband Internet access service, and we seek comment on that tentative conclusion.**

All attachers in Oregon, including broadband Internet access service providers, are subject to the same pole attachment rate formula. Please refer to response 13a.

**34. We [FCC] seek comment on whether, when they are “telecommunications carriers,” wireless providers are entitled to the telecom rate as a matter of law, or whether we should adopt a rate specifically for wireless pole attachments.**

The Oregon Commission applies the same rules to wireless telecommunication carriers as other pole attachers. Our Order No. 07-137 set forth our reasoning:

Attachments by wireless carriers are covered by the federal pole attachment statute. *See National Cable & Telecommunications Assn., Inc. v. Gulf PowerCo.*, 534 US 327, 340 (2002).

The Supreme Court addressed arguments that only wires and cables were governed by the statute, and not antennae. *See id.* The Court noted that the statutory language did “not purport to limit which pole attachments are covered,” and that the broader term “associated equipment” allowed room for regulation of wireless attachments. *See id.* at 340-341. The Court also dismissed arguments that poles are essential facilities for wireline services, but not wireless services, deferring to the FCC’s decision to not distinguish between providers of telecommunications services.

The Oregon laws governing pole attachments, though passed in 1979 before the Telecommunications Act of 1996 broadened the federal law, are broad in scope. For instance, an attachment means “any wire or cable for the transmission of intelligence,” supported by “any related device, apparatus, or auxiliary equipment” installed on any pole “or other similar facility” that is owned by a utility. *See* ORS 757.270(1). Similarly broad is the definition of licensee: “any person, firm, corporation, partnership, company, association, joint stock association or cooperatively organized association that is authorized to construct attachments upon, along, under or across the public ways.” ORS 757.270(3). Further, the Commission has the authority to regulate the “rates, terms and conditions for attachments by licensees to poles or other facilities” of utilities. *See* ORS 757.273.

This Commission has certified to the FCC that it will regulate pole attachment matters, which could be construed to encompass wireless attachments. While the Oregon commission is not required to follow federal statutes precisely, the Commission has found that federal law is instructive. *See* Order No. 05-981. In addition, the legislature provided the Commission broad authority to regulate attachments. For these, we conclude that the pole attachment statutes, ORS 757.270 through ORS 757.290 and ORS 759.650 through ORS 759.675, give the Commission jurisdiction to regulate wireless attachments to poles, and the rules adopted here may also apply to wireless attachments that are also governed by the federal statutes. The OJUA argued that there is no clear definition of “wireless” to specify what kind of operators should have access to poles regulated by the Commission. *See* OJUA comments, 1 (Oct 24, 2006). We exercise our jurisdiction only to those wireless carriers who would be covered by federal law, to ensure that they fall within the scope of 47 USC 224, which this state has chosen to preempt. *See National Cable & Telecommunications Assn., Inc.*, 534 US at 342.

Pole owners and Staff have argued that the guidelines established here may not fit wireless carriers, and in a contested case, those arguments may effectively rebut the default provisions adopted here. The FCC acknowledged arguments that wireless attachments may use more space, fewer poles, and result in higher costs than traditional wireline attachments. However, the FCC also asserted, “If parties cannot modify or adjust the formula to deal with unique attachments, and the parties are unable to reach agreement through good faith negotiations, the Commission will examine the issues on a case-by-case basis.” *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, 13 FCC Rcd 6777 ¶ 42 (rel Feb 6, 1998). This Commission adopts a similar approach in this order. Ideally, the principles set forth in these rules will establish the framework for participants to negotiate their own contracts.

We will not delay application of these rules until a docket specifically related to wireless carriers is completed. However, a docket regarding wireless carriers, including safety concerns, should be opened as soon as possible. Until that time, the Commission will resolve issues on a case-by-case basis, considering the contract parameters adopted in this order.

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**37. Parties also expressed concerns regarding performance of make-ready work, including timeliness, safety, capacity, and the use of boxing and extension arms... We [FCC] seek comment on these and any other pole attachment access concerns.**

OPUC's pole attachment rules related to make-ready work are covered under OAR 860-028-0100 (Application Process for New and Modified Attachments).

All Oregon entities must construct, operate and maintain their attachments and associated facilities in compliance with the National Electrical Safety Code (NESC) per ORS 757.035 and OAR 860-024-0010.

In Oregon, the use of "boxing" of poles is prohibited because it violates NESC Rule 213 (Accessibility) or other related rules including, but not limited to: a) Rule 236 (Climbing Space); b) Rule 237 (Working Space); c) Rule 238 (Vertical Clearance between Certain Communications and [Electric] Supply Facilities located on the same Structure); and d) Rule 238E (Communications Worker Safety Zone). Some parties have urged that the prohibition against boxing be eliminated. But, even if the NESC did not prohibit boxing, very serious safety concerns would arise, because whenever a person climbs a pole, they must use a safety harness for climbing. Boxing of poles would prevent the climber from continuing the climb without unlatching the safety harness to overcome the boxing barrier, which creates an unwanted safety condition.

Because of the safety concern and the knowledge from our experience in Oregon that most attachers and pole owners do not have sufficient numbers of bucket trucks and other high-lift equipment to handle the repairs needed in responding to emergencies and disasters, our recommendation is for the FCC to follow the NESC.

The Commission also has concerns with the FCC authorizing drop lines to be installed on poles without permission of the owner as some parties have recommended. Service lines (i.e., lines that connect the distribution system to the customer's building), like other attachments, are required to be permitted in Oregon to ensure the safety of the pole, the public and line workers. The Oregon Commission has long recognized the need for prompt attachment of service lines. Consequently, the OPUC has rules allowing an attacher to install a service drop on a pole without prior owner

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permission as long as the attacher complies with the pole owner's contract and the NESC, and the attacher applies to the owner for a permit within 7 days of the service drop installation.<sup>3</sup>

Respectfully submitted,



Lee Beyer  
Chairman



John Savage  
Commissioner



Ray Baum  
Commissioner

cc: FCC Commissioners

Attachment – Oregon PUC Order No. 07-137

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<sup>3</sup> See note 2 and refer to OAR 860-028-0020(27) and OAR 860-028-0120(3) made effective in 2001.